ISSUED FEBRUARY 17, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

GIRISH NARANBHAI & NITAL GIRISH PATEL dba Allura Farm Dairy 8809 North Grove Avenue, Rancho Cucamonga, CA 91730, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6817 File: 20-309613 Reg: 96037867 Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen Date and Place of the Appeals Board Hearing: October 1, 1997 Los Angeles, CA

Girish Naranbhai and Nital Girish Patel, doing business as Allura Farm Dairy (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license for co-licensee Girish Naranbhai Patel having conspired to receive and having bought or received cigarettes represented as being stolen and having entered a plea of nolo contendere to the crime of attempting to receive stolen property, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from

[1]The decision of the Department, dated February 27, 1997, is set forth in the appendix.

violations of Business and Professions Code §24200, subdivisions (a) and (d), and Penal Code §§496, 664, and 182, subdivision (a)(1).

Appearances on appeal include appellant Girish Naranbhai and Nital Girish Patel, appearing through their counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew Ainley.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 25, 1995. Thereafter, the Department instituted an accusation against appellants charging that co-licensee Girish Naranbhai Patel (hereinafter referred to as "appellant") conspired to receive and, on July 9 and August 7, 1996, bought or received, cigarettes represented as being stolen. At the administrative hearing, the accusation was amended to add Count 2, which alleged that appellant entered a plea of nolo contendere on December 13, 1996, in the San Bernardino County Superior Court, to the crime of attempting to receive stolen property.

An administrative hearing was held on January 16, 1997, at which time oral and documentary evidence was received. At that hearing, testimony was presented by the undercover Department investigator and by appellant concerning the transactions in question.

Subsequent to the hearing, the Department issued its decision which determined that appellant had violated the law and entered a plea as alleged in the accusation, and that his crimes involved moral turpitude. The Department ordered

appellants' license revoked.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) they were denied the assistance of adequate counsel at the administrative hearing; (2) appellant was entrapped; (3) the decision is not supported by the findings and the findings are not supported by substantial evidence; and (4) the penalty is excessive.

DISCUSSION

I

Appellant contends that the attorney representing him at the hearing before the Administrative Law Judge (ALJ) was not competent in that he did not object to the amendment of the accusation at the hearing; he elected not to seek a continuance in light of the amendment of the accusation; and he did not raise certain defenses, such as entrapment, or arguments, such as a lack of nexus between the crime and fitness to hold a license.

There is a distinction between inadequate representation and tactical decisions made by counsel. It seems clear that the decisions made by appellant's counsel regarding amendment of the accusation and the offer for a continuance were tactical rather than incompetent, and were made on the basis of informed choice after consultation with appellant. Likewise, the failure to raise the particular arguments or defenses that appellant's present counsel raises does not amount to inadequate representation.

II

Appellant alleges that investigator Kenny's two visits and one phone call to appellant's premises "importuning the purchase of allegedly stolen property . . . constituted official misconduct sufficient to raise the defense of entrapment . . . ." (App. Br. at 15.)

We disagree with appellants' hyperbolic description of the officer's actions as "importuning" appellant to purchase the cigarettes. Asking appellant if he was interested in purchasing the cigarettes simply is not evidence of police misconduct, but is the essence of the court-approved "sting" operations conducted by law enforcement. Appellant has not pointed to any evidence of misconduct on the part of the investigator that would support his contention.

III

Appellant contends that there is no substantial evidence that appellant had actual knowledge the cigarettes in question were stolen, that the other two people involved were his agents,[2] that appellant's plea of nolo contendere is evidence appellant committed a crime involving moral turpitude, or that the crime alleged had a sufficient nexus to his qualifications to hold a license to justify revocation.

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[2]Appellant is charged in Count 1 as a co-conspirator, not as an employer with imputed liability. There is, therefore, no finding regarding an agency relationship between appellant and the two others involved. The parties did not address the issue of co-conspirators in their briefs, but discussed the evidence regarding an agency relationship. Since there is no finding on the issue the parties discussed, and there is no discussion by the parties of the finding regarding co-conspirators, we find it unnecessary to consider this argument.

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

When, as in the instant matter, the findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].)

Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (Brookhouser v. State of California (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr. 658].)

There were some conflicts in the testimony presented by investigator Kenny and by the appellant, but it was within the discretion of the ALJ to determine the credibility of the witnesses and to resolve those conflicts accordingly. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal..2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

There was clearly substantial evidence, as defined above, to support the findings regarding appellant's knowledge.

Appellant seems to contend, by his quotation of language from In re Estate of McGowan (1973) 111 Cal.Rptr. 39, 44 [35 Cal.App.3d 611], that a plea of nolo contendere cannot be a basis for discipline without an independent determination the alleged offense was actually committed by the person charged. This is clearly not a valid contention, because the ALJ did determine appellant had committed the offense.

Appellant's argument that the offense to which appellant pled nolo contendere was not one involving moral turpitude also fails. The crimes to which appellants pled nolo contendere fall squarely within the definition set out in Rice v. Alcoholic Beverage Control Appeals Board (1979) 89 Cal.App.3d 30, 37 [152 Cal.Rptr. 285]: "moral turpitude is inherent in crimes involving fraudulent intent, intentional dishonesty for purposes of personal gain or other corrupt purpose."

Appellant's argument that there is no nexus between the crime and the operation of the premises also fails. To say there is no nexus between dishonest activity for gain and appellant's fitness to hold a license and sell alcoholic beverages to the public ignores the social and legal necessity for any retailer to deal honestly with his customers in order to be entitled to a license. Appellant has demonstrated that he is willing to violate the law for personal gain; the Department does not need to wait until dishonesty is demonstrated in direct dealings with appellant's customers before imposing discipline.

IV

Appellant contends that the penalty is excessive, unfair, and unreasonable since it subjects not just appellant, but also appellant's spouse, who is an innocent co-licensee, to revocation of the license. Appellant argues that his spouse should be able to retain the license in her name, with conditions imposed to prevent appellant from participating in the operation of the licensed premises, or his spouse should have the opportunity to sell the license to an uninvolved third party.

The law is harsh, but clear, that even the injury to an innocent co-licensee spouse does not bar revocation. (Rice v. Alcoholic Beverage Control Appeals Board (1979) 89 Cal.App.3d 30 [152 Cal.Rptr. 285].) Rule 58 (Cal.Code Regs, title 4, §58) requires the spouse of an applicant to have the same qualifications as the applicant; that requirement would prevent appellant's spouse from holding the license herself.

CONCLUSION

The decision of the Department is affirmed.[3]

BEN DAVIDIAN, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[3]This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.